Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Arthur F. Quern, Director of the Illinois Department of Public Aid, respectfully prays that a Writ of Certiorari issue to review the *En Banc* Order and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on October 19, 1977.

OPINIONS BELOW

This case was previously before the United States Supreme Court on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as *Edelman v. Jordan*, 415 U.S. 651 (1974), in which this Court reversed and remanded the cause for further proceedings consistent with the opinion. On remand there have been three opinions below. The opinion of the United States District Court, Northern District of Illinois, Eastern Division, is reported as *Jordan v. Trainor*, 405 F.Supp. 802 (N.D.Ill. 1975) and is included herein as Appendix A. The opinion of a three-judge panel of the United States Court of Appeals for the Seventh Circuit is reported as *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977) and is included herein as Appendix B. The *en banc* opinion of the United States Court of Appeals for the Seventh Circuit is not reported and is included herein as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit (three-judge panel) was entered on March 10, 1977. A Petition for Rehearing *en banc* was granted on April 25, 1977. On October 19, 1977, the United States Court of Appeals for the Seventh Circuit entered its *en banc* opinion and judgment. This Petition for a Writ of Certiorari is filed within 90 days of the date of the entry of that order. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the Eleventh Amendment to the United States Constitution a jurisdictional bar to the exercise of a federal court's equitable powers to award retrospective relief against a non-consenting sovereign state in the form of a class notice regarding entitlement to retroactive benefits?

2. Has the law of this case as established by the Supreme Court in *Edelman* been circumvented and eviscerated by the *en banc* order and judgment of the Court of Appeals?

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

STATEMENT OF THE CASE

The present controversy in this extensively litigated case concerns the scope of the Eleventh Amendment of the United States Constitution as a jurisdictional bar to the exercise of a federal court's equitable power to fashion retrospective relief against a non-consenting sovereign state. At issue, in particular, is the power of the District Court to order Illinois to notify some twenty thousand members of the plaintiff class of their possible entitlement to retroactive benefits, an order which artfully seeks to evade the jurisdictional bar of the Eleventh Amendment and which eviscerates the law of this case as established by this Court in *Edelman v. Jordan*, 415 U.S. 651 (1974).

In 1971 Respondent filed a Complaint for equitable and monetary relief which alleged that the State Defendants, in administering Illinois' Aid to the Aged, Blind and Disabled Program (AABD), failed to comply with federally mandated time limits for processing AABD applications for assistance. The relief requested in the Complaint was both prospective and retrospective: prospective injunctive relief to require the Defendant to conform his conduct in the future to federal law; and retroactive relief in the form of court-ordered payments of withheld benefits to compensate members of the Plaintiff Class for the State's tardy processing procedures.

The Eleventh Amendment issue previously before this Court arose out of the trial court's permanent injunction entered March 15, 1972, which, *inter alia*, ordered the state officials to release and remit AABD payments

wrongfully withheld, by reason of delay, from members of the Plaintiff Class, defined in the District Court's Judgment Order as all applicants for AABD in the State of Illinois who applied for assistance between July 1, 1968, and April 16, 1971, and who did not receive their initial check within the applicable federal time limits.

On Petitioner's Appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that the Eleventh Amendment did not bar the exercise of the Court's equitable powers to award retroactive benefits against the State, and in the alternative, that Illinois had constructively consented to suit by participating in the federal AABD plan. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). The United States Supreme Court granted certiorari on the issue of whether the Eleventh Amendment barred retroactive benefits. Since the 1973 ruling by the Seventh Circuit, the sole issue in this case has revolved around the propriety of retrospective relief.

In reversing the ruling of the Seventh Circuit, the United States Supreme Court in a landmark decision unambiguously held that the Eleventh Amendment constitutes a jurisdictional bar to the exercise of federal judicial power and that:

> ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex Parte Young, supra*, and may not include a retroactive award which requires payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra.*" 415 U.S. at 677.

Despite this ruling by the nation's highest court, Respondent, on remand before the Seventh Circuit,

sought to evade the bar of the Eleventh Amendment by seeking *inter alia* (1) an identical order of equitable restitution based on the Fourteenth Amendment, and (2) an order directing the District Court to enter a declaratory judgment that members of the Plaintiff Class were illegally deprived of AABD assistance and are entitled to restitution. This subterfuge was unavailing and the Court of Appeals reversed the award of retroactive benefits and remanded the cause to the District Court with instructions to modify its judgment in accordance with the decision in *Edelman*.

Respondent, in yet another maneuver to undo the ruling of this Court, successfully petitioned the District Court to require the State to send each member of the Plaintiff Class a written notice entitled "Notice of Right to Appeal Denial of Benefits" to each member of the Plaintiff Class whose application was delayed in processing during the period between 1968 and April 16, 1971, the date of the preliminary injunction. Such notice required the state officials to set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. The Court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." By its terms the notice of appeal set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.A.B.D. application and as a consequence denied me benefits to which I am entitled." The District Court's decision is reported as *Jordan v. Trainor*, 405 F.Supp. 802 (N.D.Ill. 1975), see Appendix A.

Petitioner appealed this decision to the United States Court of Appeals for the Seventh Circuit, and a three-

judge panel of that Court unanimously reversed the order of the District Court and held that the Eleventh Amendment constituted a bar to the trial court's order requiring such notice. The panel further found that the order attempted to accomplish by indirection an end prohibited by this Court in *Edelman*. See *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977), Appendix B.

The Court of Appeals granted Respondent's petition for a rehearing *en banc* and in a majority decision, three judges dissenting, held that a retrospective order requiring a non-consenting state to send a notice regarding retroactive benefits to members of the Plaintiff Class is constitutionally permissible under the Eleventh Amendment and does not circumvent the law of the case as established by this Court in *Edelman*.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT.

On February 8, 1977, the United States Court of Appeals for the Third Circuit in *Fanty v. Commonwealth of Pennsylvania*, 551 F.2d 2 (3rd Cir. 1977), petition for writ of certiorari, filed sub nom., *Randle v. Beal*, No. 76-6853, considered the identical issue presented in the instant action, and rejecting the reasoning adopted by the Seventh Circuit in its *en banc* opinion, reached the opposite conclusion based upon this Court's ruling in *Edelman*.

The Third Circuit, citing *Edelman*, correctly states that the notice relief in question must be tested against two lines of inquiry: (1) whether the relief operates against the sovereign itself or only against an officer;

and (2) whether the relief is a form of redress for a "past breach of a legal duty", 551 F.2d 2, 5.

The Chief Judge of the Third Circuit, Collins J. Seitz, in the controlling Opinion found that the District Court's Order violated the teachings of this Court in *Edelman*. The Pennsylvania notice order under review looked to a "past breach of a legal duty" and was not a "necessary consequence of compliance in the future with a substantive federal-question determination." As a result, the order, in effect, was against a non-consenting sovereign state and the District Court was without authority, under the Eleventh Amendment, to issue the same.

In its *en banc* decision the Seventh Circuit openly concedes that the order in this case operates directly against the sovereign State of Illinois, see Appendix, p. 28a, but, without any authority for the proposition, contends that such an order is permissible under the Eleventh Amendment because "the form of notice we envisage would not create a 'liability' against the state." Appendix, p. 29a. Such an argument ignores the fact that by its terms the Eleventh Amendment constitutes a jurisdictional bar "to any suit in law or equity, commenced or prosecuted against one of the United States."

In a leap of faith[1] unsupported and unsupportable by any logic, the Seventh Circuit, discounting the contrary ruling of the Third Circuit, reaches its desired outcome by resorting to definitional legerdemain:

> "It cannot be strongly argued that the problem did not arise in part from a past breach. The district court rightfully curtailed the continuing breach as

[1] The Seventh Circuit's opinion invokes the admonition of the 82nd Psalm. Petitioner directs this Court to the teachings of Leviticus, 19:15: "Judges must always be just in their sentence, not noticing whether a person is poor or rich, they must always be perfectly fair."

> to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment." Appendix, p. 32a.

Boiled down to its bare bones, the Court is illogically saying that relief which looks to "a past breach of a legal duty" is neither prospective nor retrospective but simultaneously affects both dimensions for Eleventh Amendment purposes.

The result of the erroneous refusal of the Court of Appeals sitting *en banc* to bar any form of retrospective relief against a non-consenting sovereign State has grave implications for the principle of federalism and dual sovereignty which forms the basis for the Eleventh Amendment's prohibition against suing States in federal court. In disregarding the sound decision of the Third Circuit, the Seventh Circuit has created a constitutional conflict which this Court should resolve.

THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE LAW OF THE CASE AS ESTABLISHED BY THIS COURT TO THE NOTICE ISSUE BEFORE IT.

In its order and opinion of October 19, 1977, the Court of Appeals ignored the legal principle that an inferior court is bound to obey the law of the case as established by a higher court. The law of this case is the substantive ruling by the United States Supreme Court in *Edelman*, which is controlling on any and all subsequent stages of the case unless vacated or reversed. The Supreme Court ruled, and the law of this case is, that a federal court lacks jurisdictional power to hear, and Respondent may not litigate, issues arising out of the past conduct of a State and secure a mandatory order regarding and affecting retroactive benefits, without the State's consent.

Respondent's motion in the District Court on remand represents a scandalous and brazen effort to subvert the decision of the United States Supreme Court and to secure by indirection that which is forbidden directly. Judge Pell, in his dissenting opinion, deplored the artful evasion of the law of the case which Respondent has perpetrated. By Judge Pell's analysis there can be no constitutionally inoffensive form of notice regarding retroactive benefits consistent with this Court's decision:

> "Notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which 'is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials'.
>
> This court, in my respectful opinion, should not lend its hand to such subterfuge." Appendix, p. 33a.

That a subterfuge has been engaged in becomes clear upon consideration of this Court's pertinent observation in *Edelman* that as time goes by relief regarding retroactive benefits becomes compensatory rather than remedial because "the coincidence between previously ascertained and existing needs becomes less clear." *Edelman v. Jordan*, 415 U.S. 651, 666, footnote 11.

The sole realistic function of the relief authorized by the Seventh Circuit is to provide the Plaintiff Class with a vehicle for the recovery of money from the Treasury of the State of Illinois in respect to needs which existed six to nine years ago. This Court has absolutely precluded the Plaintiff Class in this case from using a federal forum to secure compensatory relief from the State of Illinois. Since the notice relief at issue here is in essence compensatory and is designed to permit recovery of money from a non-consenting State, the Seventh Circuit decision runs directly afoul of *Edelman*. As this Court previously stated in *Ford Motor Company v. Department of Treasury*, 323 U.S. 459, 464 (1945):

> When the action is *in essence* one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . ." (Emphasis added).

CONCLUSION

For all these reasons, it is respectfully requested that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 70

JOHN JORDAN, et al.,

Plaintiffs,

v.

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid, et. al.,

Defendants.

MEMORANDUM OPINION

This case is now before the Court on remand from the decision of the United States Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), and the order of the Seventh Circuit dated October 29, 1974 to this Court, and pursuant to the motion of the plaintiffs to require notice to members of the plaintiff class.

The only remaining question in this case relates to fashioning the appropriate relief, if any, to deal with defendant's illegal denial of public assistance benefits to the needy aged, blind, and disabled members of the plaintiff class, which consists of all needy aged, blind, and disabled persons who applied for Aid to the Aged, Blind and Disabled (AABD) at one of the offices of the Illinois Department of Public Aid between July 1, 1968 and April 16, 1971, and whose applications were illegally delayed in processing, and who, as a result, were illegally denied benefits to which they were entitled.

Upon finding that the plaintiff class was illegally denied benefits to which its members were entitled, the District Court, Judge Napoli presiding, entered a permanent injunction "to insure compliance, present and future, with the requisite time limitation," (*Jordan v. Swank*, 71 C 70, unpublished opinion, p. 2, February 4, 1972), and also ordered the state officials to release and remit AABD payments wrongfully withheld from those members of plaintiff's class, defined in the trial court's order to include:

> Those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for Aid to the Disabled as of January 1, 1971) limits. *Jordan v. Swank*, p. 3 *supra*.

The holding of the district court was affirmed by the Seventh Circuit in *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973); in an opinion in which the Court upheld the relief granted by the trial court and agreed that the "defendants, acting under color of state law, denied eligible welfare applicants timely assistance benefits to which they were entitled by federal rights, and held that the District Court properly ordered equitable restitution of the benefits wrongfully denied. *Weaver, supra*, at 994. Moreover, the Seventh Circuit held that the Eleventh Amendment to the Constitution did not deprive the federal court of jurisdiction to order the defendants to pay assistance benefits illegally denied members of the plaintiff class.

In *Edelman v. Jordan, supra*, the United States Supreme Court reversed that portion of the Seventh Circuit's opinion which affirmed the District Court's order that retroactive benefits be paid by Illinois State officials. The Court held that, under *Ex Parte Young*, 209

U.S. 123 (1908), the prospective portion of the District Court's order which enjoined state public aid from failing to process applications within federal time limits, did not contravene the guidelines of the 11th Amendment. On the other hand, *Ex Parte Young* did not, it continued, authorize ordering recovery from state funds of an accrued monetary liability. The test established by the Court in *Edelman*, for determining which claims against the unconsenting state are barred by the 11th Amendment and which are permitted, is whether the award is by its terms prospective in nature, even though its implementation may have fiscal consequences. This characterization avoided the labeling of relief as equitable or monetary, which the Court found to be of little analytical benefit, and focused on the substance of the relief awarded. An ancillary fiscal impact in conjunction with the state's compliance in the future with a court order was held to be permissible under the 11th Amendment. The Court also rejected the Seventh Circuit's theory that the State of Illinois had consented to suit for retroactive relief by participating in the federal AABD program, holding that such consent will be found to exist only where set out in explicit statutory language or overwhelming textual implication.

The question here is whether the relief requested by plaintiff is prospective in nature, notwithstanding the fiscal consequences of its award, or a retroactive award of monetary relief falling within the proscription of *Edelman v. Jordan, supra*.

The relief now requested by plaintiffs is neither one for retroactive monetary relief nor an injunction requiring the state to conform its conduct in the future to a set of standards. Rather, it involves only the sending of notices to members of the plaintiff class explaining their

possible entitlement to retroactive benefits and the appropriate state administrative and appeals procedures to be followed in applying for those benefits. The requested relief, therefore, while related to possible retroactive benefits, is clearly not an award of those benefits. The plaintiffs contend that *Edelman* does not deprive this court of jurisdiction to grant the requested relief and cite authority in support thereof. The defendants argue that *Edelman* erects an absolute bar, based on the 11th Amendment, to any order related in any possible way to payment of retroactive benefits by the state, that no existing authority supports the Court's ordering the state to send notices, and that plaintiffs are estopped by their pleadings to seek state administrative remedies.

The following language from the Supreme Court's opinion in *Edelman* indicates its concern with the award by a federal court of direct retroactive monetary relief against a state, rather than orders requiring the state to change existing policy or to inform citizens of their rights under state and federal law, even when a monetary loss would occur therefrom:

> We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in Ex parte Young hewed to no such line.
>
> * * * * *
>
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those

> whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State . . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

The instant case involves the awarding of non-monetary relief but related to the possibility of securing, through the state administrative apparatus, benefits illegally withheld from members of the plaintiff class. This relief falls outside the area proscribed by the Supreme Court's *Edelman* opinion.

The Eleventh Amendment seeks to avoid the clash of federal and state sovereigns. In this respect, a distinction exists between compensating individuals directly and notice that relief may be available. Even if the latter ultimately results in a direct award of benefits, federal interference in such an award would be minimal. The Eleventh Amendment by its terms denies jurisdiction to federal courts only of suits against one state by citizens of another or by citizens or subjects of a foreign state. While this has been read to preclude federal courts from ordering payments by states of state funds, it has never been held to prohibit federal courts from fashioning other appropriate relief in suits in law or in equity between citizens of a state and officials of the same state, e.g., writs of habeas corpus, injunction, mandamus, etc. Nor, do we believe, may it be used by a state to keep secret the fact that a number of its citizens may, under established state procedures, have valid

claims against it. Accordingly, we conclude that ordering the sending of notices is not barred by the 11th Amendment to the Constitution.

Among the courts addressing the precise issue before us, none has denied the motion to require the sending of such notices. In *Grubb v. Sterrett*, 315 F.Supp. 990 (N.D. Ind. 1970), a pre-*Edelman* case, the court held a statewide welfare regulation to be contrary to the Social Security Act and, therefore, invalid under the Supremacy Clause. Because the state had provisions for hearings regarding corrective retroactive payments, the court did not grant the retroactive monetary relief; rather, it remanded the claim for back benefits to the Indiana Department of Public Welfare and required the state to send notices to members of the plaintiff class. This course obviated the Court's consideration of any 11th Amendment objection to its jurisdiction to award retroactive monetary benefits.

In *Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973), also pre-*Edelman*, the Eighth Circuit vacated a District Court decree requiring the Iowa Department of Public Aid to make retroactive payments on the ground that it was unnecessary to decide the 11th Amendment question, since the Iowa Department of Public Aid regulations specifically required the payment, following state administrative hearings, of benefits illegally withheld. It also upheld that portion of the District Court's order which held a section of the Iowa Code violated the Social Security Act and required the state to send a notice of eligibility to those previously denied benefits.

In *Morris v. Houston*, 0-250-73 C.A. (W.D.Mich. Oct. 18, 1974), the Court held that a Michigan Public Aid Department's regulation excluding the unborn child

from the definition of a "dependent child" was contrary to the Social Security Act.* The Court recognized that *Edelman* precluded the retroactive payment of benefits, but, regarding the question of whether the Amendment barred the remanding of plaintiffs to state fair hearing procedures in order to recover benefits illegally denied, Chief Judge Fox held:

> The Court need not enter an order remanding the plaintiffs to state administrative procedures, because these procedures are available to them without such an order. . . . The Eleventh Amendment operates as a jurisdictional bar on this Court in limited circumstances, but the duties of the state remain intact and enforceable by other means than direct injunctive order by a federal court for the payment of retroactive benefits. The Court cannot presume that the state will violate its own regulations but should it do so, the aggrieved parties will certainly have an action in state or federal court. The members of the plaintiffs' second subclass [needy pregnant women and their unborn children who applied for AFDC benefits in Michigan after the date of the injunction] cannot utilize the state procedures unless they are notified of their existence. Therefore the injunction to be issued will enjoin the defendants to inform the members of the plaintiffs' second subclass that they may apply for retroactive benefits through the state hearing procedure, and shall also give the members of the subclass precise information as to the means of application. In these and other particulars, the notice should follow the form and content required by state and federal regulations for similar notifications, due allowance being made for the special circumstances of this case. *Houston* at 15-16.

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* The Sixth Circuit by order reversed *Morris v. Houston* on the legality of the "unborn child" exclusion, based on the Supreme Court's opinion in *Alcala v. Burns*, 43 USLW 4374 (March 18, 1975).

The foregoing cases clearly demonstrate that the 11th Amendment is no bar to the requested relief.

The cases cited by defendants in support of their position do not address the issue of notice. *Alcala v. Burns*, 494 F.2d 743 (8th Cir. 1974), held that the 11th Amendment prohibited an award of retroactive payments. That Court, which also decided *Doe v. Gillman, supra*, based its holding on an earlier decision in which it directly resolved the question of whether the 11th Amendment bars retroactive relief. *Taylor v. Lavine*, 497 F.2d 1208, 1213 (2nd Cir. 1974) is inapposite, even though the Second Circuit considered plaintiff's appeal from the District Court's denial of retroactive payments, inasmuch as the Second Circuit reversed the District Court's finding that the New York regulations were invalid under the Social Security Act. In *Taylor v. Hill*, 377 F.Supp. 495 (W.D. N.C. 1974) the District Court granted a preliminary injunction on the grounds, *inter alia*, that plaintiff would suffer irreparable harm resulting from the court's inability to award retroactive payments, where welfare benefits have been unlawfully withheld. *Barron v. Bellows*, 496 F.2d 1198 (5th Cir. 1974), simply denied retroactive injunctive relief and financial assistance to members of the plaintiff class. Similarly, *Owens v. Roberts*, 377 F.Supp. 45 (M.D. Fla. 1974), in light of *Edelman*, granted defendant's motion to amend a judgment which had awarded retroactive benefits to members of the affected class. A more relevant consideration in *Owens* was the Court's determination of whether the state should be required "to identify the members of the affected class" for the purpose of "grandfathering" them into the Federal Supplemental Security Income Program, which assumed responsibility as of January 1, 1974 for the state AABD program. The Court concluded that such a burden should not be placed

on the state because of, *inter alia*, the inordinate expense and extant alternative means of identification. It is noteworthy that the Court apparently assumed that the 11th Amendment would not bar such an order.

Defendants contend in a supplemental brief that the Seventh Circuit's denial of plaintiffs' request for declaratory judgment on remand and defendants' assertions before the Seventh Circuit, in opposition to plaintiffs' request, which argued that the 11th Amendment barred any type of relief pertaining to retroactive benefits, settled the question of whether the relief presently requested by plaintiffs is barred by the 11th Amendment. We disagree. The Seventh Circuit Order, pursuant to *Edelman*, only reversed the District Court's award of retroactive benefits and ordered the modification of the District Court judgment with respect to the retroactive entitlement of Illinois applicants for aged and blind benefits under 45 C.F.R. § 206.10. Even if the Court of Appeals had held that the *Edelman* decision bars the granting of declaratory relief regarding retroactive benefits, such a holding would not necessarily bar the relief now requested by plaintiffs.

Defendant's final contention is that plaintiffs are estopped by their pleadings to request that notices pertaining to the existence of state administrative remedies be sent out. It cites *Sinclair Refining Company v. Thompkins*, 117 F.2d 596 (5th Cir. 1941); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969); *Hall v. U.S.*, 314 F.Supp. 1135 (N.D. Cal. 1970), in support of this contention.

The cases cited by defendant stand for the proposition that allegations of fact pleaded by a plaintiff are binding. In *Thompkins*, plaintiff's allegation that a small blaze existed when she threw kerosene on the fire,

which led to an explosion, was conclusive of her contributory negligence. In *Hopper*, plaintiff's allegation that his termination was not a breach of contract was conclusive as to the non-existence of the contract. In *Hall*, plaintiff's allegations relating to when he learned that his wife was sterile and that it allegedly resulted from negligent treatment by a military doctor was binding in determining whether his action was time barred.

In the instant case, plaintiffs' allegations that "[n]o adequate administrative remedy or remedy at law is available to the plaintiffs" are not factual assertions which would be binding on plaintiffs. Rather they are legal judgments. As such, they are subject to judicial scrutiny and do not fall into the category of allegations relating to objective phenomena or facts existing irrespective of an observer's interpretation. Even if the instant allegations were not distinguishable from those present in the authorities cited by defendant and even if we found that those allegations were binding upon the instant request, that finding would not have the effect of precluding the sending of notices, inasmuch as it is not inconsistent for plaintiff to maintain that "adequate" remedies are not available and simultaneously request that notices be sent regarding the existence of available albeit less than adequate remedies. In each of the cases cited by defendants the plaintiff's later position was inconsistent with the binding pleadings.

For the foregoing reasons, plaintiffs' motion to require the State of Illinois to send plaintiff class members notices regarding the existence of possible state administrative remedies is granted. In this connection, defendants have requested a stay of the effective date of our order pending appeal to the Seventh Circuit and ultimately, perhaps, to the United States Supreme Court.

While it is logical that no notices should be sent until the validity of our order has been finally determined, we see no reason why the state should not currently compile the names and addresses of all members of the plaintiff class who would be entitled to such notice. There has been serious question raised as to whether the state has compiled and is maintaining the necessary records from which such a list could be prepared. The claims here relate to the period July 1, 1968—April 16, 1971. In order to protect against any possible loss or destruction of the necessary records and to insure that notices can be sent out immediately in the event our order is approved, the state is ordered to prepare the list of names and addresses of the persons to whom such notice would be sent but sending of the notices is stayed pending appeal. An appropriate order will enter.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT JUDGE

Dated: August 22, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 70

JOHN JORDAN, et al.,

Plaintiffs,

v.

JAMES TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants.

FINAL JUDGMENT AND INJUNCTION

This cause coming on to be heard pursuant to the order and mandate of the Seventh Circuit, and the motions of the parties, and the memorandum opinion of the Court issued July ....., 1975,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The plaintiffs' motion to require notice to members of the plaintiff class is granted.

2. The defendants' motion to deny plaintiffs' request for notice to members of the plaintiff class is hereby denied.

3. Paragraph 5 of the judgment in this cause entered on March 15, 1972, granting retroactive benefits to members of the plaintiff class is hereby vacated, and the following paragraphs are substituted in place thereof as paragraph 5.

> The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, attorneys and those in active concert and participation with them, are hereby enjoined, to notify each member of the plaintiff class (as defined

below) that he has been denied assistance benefits, with the amount specified in each individual case, and that he may attempt to recover those benefits by signing a notice of appeal (which is to be enclosed therein, together with a return envelope) contesting the denial of those benefits, and returning it in the enclosed envelope. The defendants shall send to each member of the plaintiff class, except those persons who previously were mailed written notice of the denial of said benefits, the notice attached hereto as Exhibit A. The notice of appeal to be sent to members of the plaintiff class is attached hereto as Exhibit B.

The members of the plaintiff class are defined as all applicants for Aid to the Aged, Blind, and Disabled (hereinafter "AABD") in the State of Illinois who applied between July 1, 1968, and April 16, 1971, and were determined eligible for AABD, as follows:

(a)
Aged and blind applicants whose first full AABD check was not mailed within thirty (30) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the thirtieth (30th) day from the date of application to the date the applicant's entitlement to AABD became effective.

(b)

(i) Disabled applicants who applied between July 1, 1968, and December 31, 1970, whose first full AABD check was not mailed within forty-five (45) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the forty-fifth (45th) day from the date of application to the date the applicant's entitlement became effective.

(ii) Disabled applicants who applied between January 1, 1971, and April 16, 1971, whose first

full AABD check was not mailed within sixty (60) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the sixtieth (60th) day from the date of application to the date the applicant's entitlement became effective.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys shall submit to the Court within sixty (60) days of this judgment the names and addresses of all members of the plaintiff class, and the amount of benefits denied in each individual case. The sending of the notices to each individual member of the plaintiff class, as required above, however, shall be stayed pending appeal, if any, of this cause.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys, shall issue timely instructions to caseworkers, hearing officers, and other appropriate personnel consistent with, and in furtherance of, this final judgment and injunction.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT COURT JUDGE

Date: August 22, 1975

EXHIBIT "A"

Date:

Illinois Department of Public Aid

NOTICE OF RIGHT TO APPEAL DENIAL OF BENEFITS

When you applied for Aid to the Aged, Blind, and Disabled in the period between 1968 and 1971, your application was delayed in processing. As a result of the delay, you were denied public assistance to which you were entitled in the amount of $ ..... . As a result of a federal court order, the Illinois Department of Public Aid is required to notify you of this denial of benefits, and is also required to inform you that you may file a notice of appeal challenging the denial of benefits. Enclosed herewith is a Notice of Appeal which you should complete and mail to the Illinois Department of Public Aid in the enclosed postage paid envelope, if you wish to appeal the denial of your benefits. This notice of appeal must be mailed within sixty (60) days from the date of this notice.

If you have any questions in connection with this matter, you may call the attorneys in the federal lawsuit who have been representing the class of aged, blind, and disabled persons who were illegally denied benefits. (Legal Assistance Foundation of Chicago, [312] 939-5940. Call Collect.)

EXHIBIT "B"

Illinois Department of Public Aid

NOTICE OF APPEAL

I, _____ of _____
Appellant's Name Street or RFD

_____, Illinois _____
City County Telephone Number

hereby appeal to the Illinois Department of Public Aid for a fair hearing because of the

(X) action
or (check one)
( ) inaction

of the _____ County Department of Public Aid.

My reason for requesting a fair hearing is: (Please be as clear and specific as you can in stating the county department action (or inaction) from which you are appealing.)

The department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled.

Your Case Number _____

Type of Program _____

_____
Appellant's Signature

Please notify:

Legal Assistance Foundation of Chicago
Re: JORDAN Case
64 East Jackson Boulevard
Chicago, Illinois 60604

_____
Date

My race is: [ ] White; [ ] Negro; or [ ] Other

FOR AGENCY OFFICE USE:
TO BE COMPLETED BY THE COUNTY DEPT.

Date this Notice of Appeal received _____

Date of written or oral request for this hearing, if preceding this form _____

Date of Decision appealed from _____

Case Name _____ Case Number _____

NOTE: The county department will assist you in preparing the above form. Upon completion, file the notice with the county department, or with the Illinois Department of Public Aid, Hearing Officer, 209 West Jackson Blvd., Room 801, Chicago, Illinois 60606. You are entitled by law to a final decision on your appeal within 90 days from the time you requested the appeal, unless you have requested a delay of your hearing.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1908

JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 71 C 70—**Hubert L. Will**, *Judge.*

ARGUED DECEMBER 2, 1975—DECIDED MARCH 10, 1977

Before PELL and BAUER, *Circuit Judges*, and WHELAN, *District Judge.**

WHELAN, *District Judge.* This action has, prior to this appeal, been upon appeal to this court and thereafter was before the United States Supreme Court after a grant of certiorari. Involved in the earlier appeal was the validity of a judgment of the United States District

* United States District Judge Francis C. Whelan of the Central District of California is sitting by designation.

Court whereby the Defendants-Appellants (officials of Illinois Department of Public Aid) were ordered to process Aid to the Aged, Blind, or Disabled Program applications in the State of Illinois in conformity with federal regulations. Defendants-Appellants were also ordered to release and remit payments under such Program which had been wrongfully withheld from applicants, who were members of the original plaintiff class as framed in the complaint.

On the first appeal the Defendants-Appellants contended that the Eleventh Amendment to the United States Constitution barred the exercise of the court's equitable powers to award such retroactive benefits against the state. On such first appeal, this court affirmed the judgment of the District Court, holding that the Eleventh Amendment did not bar the exercise of the court's equitable power to award such retroactive benefits against the state. The court also held, in the alternative, that the State of Illinois has constructively consented to suit by participating in the Federal Aid to the Aged, Blind, or Disabled Program.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the United States Supreme Court stayed the granting of the retroactive relief pending appeal and thereafter reversed the decision of this court which had allowed such retroactive relief. The Supreme Court at page 677 of its opinion stated: "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires payment of funds from the state treasury . . . ." This court thereafter remanded the case to the District Court; such order of remand stated in pertinent part: "Pursuant to the mandate of the Supreme Court it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than required by the version of 45 C.F.R. § 206.10 in force on the date of application."

On remand, the District Court heard a motion of Plaintiff-Appellee to require notice to members of the plaintiff class. The District Court Judge granted such motion and ordered that the officials of the Illinois Department of Public Aid send a written notice entitled "Notice of right to appeal denial of benefits" to each member of the plaintiff class whose application was delayed in processing during the period between 1968 and 1971. Such notice required the state officials to set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. It appears from the briefs of both parties that such notice was ordered sent to approximately 20,500 persons. Also, the notice advised the particular person notified that such person "may file a notice of appeal challenging the denial of benefits." The court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." Such notice of appeal by its terms set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.A.B.D. application and as a consequence denied me benefits to which I am entitled."

On this appeal Defendants-Appellants contend that the order of the United States District Court requiring such notice, together with a form of notice of appeal, to be mailed to each member of the plaintiff class, is barred by the Eleventh Amendment. We hold that the Eleventh Amendment constitutes a bar to the trial court's order requiring such notice.

The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by the State of Illinois that each member of the plaintiff class was "denied public assistance to which you were entitled" in an amount to be stated in such notice. Unquestionably the person receiving such notice would thereupon file the notice of appeal which was forwarded to him or her. In view of the admission of liability by the state, the course of such appeal would

automatically result in payment of state funds. The payment would occur as the result of the judgment of the District Court here appealed from.

The District Court stayed that part of the order directing the mailing of the notice and form of notice of appeal pending appeal of this case; however, that portion of the order requiring the Illinois Department of Public Aid to compile a list of all of the persons entitled by the terms of the order to such notice was not stayed pending appeal.

The Supreme Court in *Edelman* at pages 677-678, makes it very clear that the Eleventh Amendment is in substance a jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program. The granting of any type of relief constituting entitlement to retroactive benefits claimed against the state is therefore precluded in this case.

Fitzpatrick v. Bitzer, ... U.S. ....., 44 U.S. L.W. 5120 (June 28, 1976), does not support the position of Plaintiffs-Appellees. It is true that the Supreme Court there reversed the decision of the Court of Appeals which had barred monetary relief to the appellants therein. However, the relief sought against the State of Connecticut in *Fitzpatrick* was for, *inter alia*, damages for past acts of Connecticut state officials in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court made it clear that it was granting the right of employees to sue the state for violation of Title VII because of the power given to Congress by Section 5 of the Fourteenth Amendment to enforce the substantive provisions of the Fourteenth Amendment. Section 5 specifically provides that the Congress shall have power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. Thus, Congress had the power in passing Title VII to include states as parties-defendant in order to enforce the rights of persons to have equal protection of the laws. It also had the power to require a state to satisfy its duties with respect to its treatment of private individuals.

Fitzpatrick further indicates that Plaintiffs-Appellees in the instant case are not entitled to the relief given by the District Court. In *Fitzpatrick* the Supreme Court restated the *Edelman* doctrine when, in referring to *Edelman*, it stated: "We concluded that none of the statutes relied upon in *Edelman* contained any authorization by Congress to join a state as a defendant. . . . The provisions of the Social Security Act relied upon by plaintiffs [in *Edelman*] were held by their terms not to 'authorize suit against any one.'" *Fitzpatrick v. Pitzer, supra*, 44 U.S.L.W. at 5122. Nor do any of the other authorities cited by Plaintiffs-Appellees support their position.

It should further be noted that the terms of the judgment of the District Court here on appeal fixed various times during which the various members of the plaintiff class could appeal the denial of A.A.B.D. assistance.

When the action is, in essence, one for the recovery of money from the state, and the action is not brought under a statute enforcing a right against a state under the Fourteenth Amendment, the state is entitled to invoke its sovereign immunity from suit. *See Ford Motor Company v. Department of Treasury*, 323 U.S. 459 at 464 (1945).

Subsequent to oral argument in this case, pursuant to former Circuit Rule 29 (now Rule 11), the appellees cited the case of *Lewis v. Shulimson*, 534 F.2d 794 (8th Cir. 1976), *stay granted*, 426 U.S. 902, as supporting their principal position. We find the support lacking. It is true that that abbreviated opinion does approve a district court order requiring a state welfare division to notify members of the appellee's class who were denied medical assistance in violation of the district court's order. The state authorities in *Lewis* challenged the order on the basis that it would require the expenditure of public funds in the process of notification, thereby violating the Eleventh Amendment. The court held that this processing expense was permissible in that it had only an ancillary effect under *Edelman*. The court pointed out in *Lewis*, at 795, that the district court order

did not require the state to make any retroactive medical payments. That the processing expenditures were all that was involved is clear from the district court opinion referring to the fact that the complaint sought an injunction "from *further* denying medical assistance." [Emphasis added.] *Lewis v. Shulimson*, 400 F. Supp. 807, 808 (E.D. Mo. 1975).

Appellees' reliance upon *Lewis* is misplaced. In the present case the state authorities are contending that the district court order while not directly ordering retroactive payments is for all practical purposes doing so. We agree. Further, we note various district court cases cited to us regarding the matter of giving and processing notification of benefits to welfare recipients, some of these cases being pre-*Edelman*. We find no persuasive authority in these cases contrary to the position we reach in the present case.

The language of *Edelman* directed to the prior order in this litigation appears to us to be directly applicable to the district court order now under review:

> [I]t is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

415 U.S. at 668. In sum, we decline to countenance the accomplishment of a prohibited end by indirection. The action of the district court in fact did not comply with our earlier remand. That remand ordered, in substance, that the district court judgment be modified to insure that entitlement need not attach to Plaintiffs-Appellees for retroactive benefits and the judgment was not so modified but instead was recouched in a form designed "in practical effect" to achieve the original goal.

For the foregoing reasons, the judgment of the district court dated August 22, 1975, is reversed and the cause is remanded to the district court for further proceedings consistent herewith.

REVERSED and REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1908

JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 70—Honorable **Hubert L. Will**, *District Judge.*

ARGUED JUNE 8, 1977—DECIDED OCTOBER 19, 1977

Before FAIRCHILD, *Chief Judge*, and SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* In 1971 plaintiffs filed this class action seeking declaratory and injunctive relief alleging failure of the Illinois Department of Public Aid to process applications for assistance under the Aid to the Aged, Blind and Disabled program (AABD) within the time limits prescribed by federal regulations. Plaintiffs sought to have entitlement attach at the end of the federal time limit. The distirct court in an unreported decision required by permanent injunction that defen-

dants comply in the future with the time limits and awarded retroactive benefits. Upon appeal that judgment was affirmed. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). The Supreme Court granted certiorari, and in a five to four decision reversed upon Eleventh Amendment grounds so much of the decree which ordered retroactive payment of benefits found to have been wrongfully withheld but left undisturbed the purely prospective relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). Thereafter this court remanded the case to the district court. After remand, plaintiffs filed a motion for an "order requiring the defendants to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty days through the state's administrative procedures, and requiring said defendants to include with such notice a form returnable to the Department of Public Aid upon which such persons may indicate their desire to appeal." Over the defendant's Eleventh Amendment objections the motion was allowed. *Jordan v. Trainor*, 405 F.Supp. 802 (N.D. Ill. 1975). The trial court's order set forth the form of the Notice of Right to Appeal Denial of Benefits to be used by the Department and the Notice of Appeal to be used by the applicant. On appeal of that order a panel of this court reversed holding that the Supreme Court in *Edelman* had interpreted the Eleventh Amendment to be a jurisdictional bar precluding any type of retroactive relief. *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977). A Petition for Rehearing in Banc was granted.[1]

The issue being reconsidered is whether or not the Eleventh Amendment bars the proposed limited use of the court's equitable power in these circumstances. Defendants do not urge upon us the view that there is no "case or controversy" as required by Article III, Section 2 of the Constitution. That problem was referred to by

[1] United States District Judge Francis C. Whelan of the Central District of California was a member of the three-judge panel which decided *Jordan*. Judge Whelan did not, however, participate in this court's vote on plaintiffs' suggestion for rehearing in banc. See FED. R. APP. P. 35.

Judge Garth in his concurring opinion in *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F.2d 2 (3rd Cir. 1976). In the present case the trial court determined that the class included applicants who had applied for AABD since July 1, 1968, and whose applications were not timely processed as required by federal regulations. In its judgment, in addition to its award to applicants of past benefits withheld, the trial court held certain applicable state regulations to be invalid and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. Only the retroactive award provision was struck down by the Supreme Court. The basic controversy did not disappear. The notice problem we now face is a related aspect of the class controversy controlled by the trial court's permanent injunction.

The specified notice required by the district court to be sent to members of the class stated in part that "you were denied public assistance to which you were entitled in the amount of $..... ." Enclosed with that notice was the other form, "Notice of Appeal," to be signed by the applicant and returned to the Illinois Department of Public Aid. That notice contained the language "The department illegally delayed in the processing of my AABD application, and, as a consequence denied me benefits to which I was and am entitled." We agree with the panel's opinion that

> "The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by the State of Illinois that each member of the plaintiff class was 'denied public assistance to which you were entitled' in an amount to be stated in such notice."

That admission was compelled by the order of the district court and appears to be a type of money judgment against the state. We agree that the district court's order controverts the Eleventh Amendment in this regard and cannot be sanctioned.

The objectionable content of the notice forms are not in keeping with the views expressed by the trial judge in his Memorandum Opinion to which they were attached. With those views, but not the forms, we agree.

The more delicate variation of that issue is the constitutionality of a mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided. Those notices would not be handicapped by any federal predetermination of state liability. The parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state.

This court is not in agreement on the constitutionality of such limited relief as an adjunct to the purely prospective relief granted. Although we view it as a close question, we hold that in the context of this case a permissible notice may be fashioned within the strictures of the Eleventh Amendment. There is no longer a claim that the state has waived its constitutional protection under the Eleventh Amendment. It is likewise conceded that the state, not merely an officer, would be directly involved in any relief granted. We realize there is little or no supporting precedent directly in point to give us complete confidence in our view, but we shall examine what we find.

We look for guidance to *Edelman v. Jordan, supra.* As the Court pointed out, the rule "has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred. . . ." 415 U.S. at 663. "*Ex parte Young* [209 U.S. 123 (1908),] does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenue of a State. . . ." *Id.* at 664. The Court also noted that the retroactive portion of the district court's order required "the payment of a very substantial amount of money." *Id.* We learn also that the character of any relief ordered which may in practice resemble a money judg-

ment payable out of the state treasury cannot be changed or made acceptable by labeling it "equitable" in nature. *Id.* at 666. What had been labeled "equitable restitution" was found to be indistinguishable in many aspects from an award of damages against the state. *Id.* at 668.

The form of notice we envisage would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. The defendant makes no issue out of any incidental administrative expense connected with the preparation or mailing of the notice. It has suggested in the record that the notice could be included in the regular monthly mailing. The necessary information comes from a computer. There is no indication that the administrative expense would be substantial.

Looking further at *Edelman*, we see some suggestion that the Eleventh Amendment, even apart from *Ex parte Young*, may not be a total and complete bar so long as it does not constitute a retroactive award for damages to be paid by state funds. The Court commented that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case. . . ." 415 U.S. at 665. Similarly, the Court recognizes that "[a]s in most areas of the law, the difference between the type barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day." *Edelman* specifically overruled three recent cases in which the Supreme Court had summarily affirmed district court judgments requiring state directors of public aid to make similar retroactive payments as were originally ordered in this case by the district court. Although the list may not be intended to be complete, there is no mention of the three-judge decision, *Grubb v. Sterrett*, 315 F.Supp. 990 (N.D. Ind. 197

summarily affirmed 400 U.S. 922 (1971).[2] That decision provided for notice to members of the class whose applications for Indiana public assistance had previously been denied under a regulation subsequently held to be invalid. The notice was to contain no prejudgment of state liability. The state was left to make the eligibility determination according to federal and state regulations. The cases specifically overruled by the Court, on the other hand, provided for actual retroactive payments. Thus we deem the omission of *Grubb* from the cases specifically overruled to be of some significance. As we read *Edelman*, we believe that the case allows limited flexibility and does not foreclose the modified relief we approve.

Plaintiff cites *Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973), *cert. denied*, 421 U.S. 920 (1975), as post-*Edelman* authority which left in effect, after a partial reversal, a requirement that the Iowa Department of Social Services send notice of eligibility to applicants previously denied benefits. The court of appeals found it unnecessary to resolve the Eleventh Amendment issue of retroactive payments since the court assumed that Iowa would follow its own regulations and that any retroactive payments owing would be made. The record in this case does not suggest that we indulge in a similar assumption to avoid a constitutional issue. Defendant dismisses *Gillman* both as a pre-*Edelman* case and because it avoids the Eleventh Amendment issue. Although the case was decided by the Eighth Circuit prior to *Edelman*, certiorari was denied by the Supreme Court after *Edelman*.

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[2] Footnote 13 of *Edelman* lists only the following cases:

1) *State Dept. of Health and Rehabilitative Services v. Zarat*, 407 U.S. 918 (1972), aff'g 347 F.Supp. 1004 (S.D. Fla. 1971); 2) *Sterrett v. Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972), aff'g unreported order and judgment of District Court (N.D. Ind. 1972) on remand from *Carpenter v. Sterrett*, 405 U.S. 971 (1972); 3) *Gaddis v. Wyman*, 304 F.Supp. 717 (SDNY 1969) (order at CCH Poverty Law Rep. ¶ 10,506 [1968-1971 Transfer Binder]), aff'd *per curiam sub nom. Wyman v. Bowens*, 397 U.S. 49 (1970).

The plaintiff also cites *Lewis v. Shulimson*, 534 F.2d 794 (8th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3634. In that case notice was required to be given by the state to those in the class who had previously been denied medical assistance in violation of the court order. However, no retroactive payments were involved. The decree was prospective in nature. *Lewis* is only slightly related to the present problem.

The defendant has called to our attention the recent case of *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F.2d 2 (3rd Cir. 1977). In that case the state had for a prior period of time attempted to collect from recipients certain previously paid social security benefits as reimbursement to the state. The plaintiff class alleged that this had been accomplished in an illegal manner. The practice of the state had been terminated prior to suit, but some applicants were still making reimbursement payments to the state under agreements entered into during the prior period. The district court did not attempt the restitution to applicants of benefits wrongfully collected by the state and denied declaratory and injunctive relief since current state practices were not in violation. The district court did, however, require the state to serve notice on two sub-classes. Those welfare recipients who were currently reimbursing the state under the prior agreements were to be notified that they were under no legal obligation to continue making reimbursements out of their federal disability benefits. Those welfare recipients who had been previously coerced and misled into making reimbursements in violation of the regulations were to be notified that as a matter of state law they might have a cause of action against the state. Each member of the appellate panel voted to reverse, but for varying reasons. Chief Judge Seitz was of the opinion that *Edelman* controlled since he viewed the district court's order as being "based on a past breach of legal duty" and granting relief not a "necessary consequence of compliance in the future with a substantive federal question determination." Judge Garth believed the Eleventh Amendment issue to be "borderline," but reversed on the basis that there was no case or controversy. Judge

Hunter dissented, and rather than require dismissal of the complaints voted to reverse and remand on the grounds that the requirements for summary judgment had not been met. He disagreed that *Edelman* required dismissal and would draw "no line so sharp" between the past and present aspects of that case. He further disagreed with Judge Garth by finding there to be a justiciable case. There are some factual distinctions between that case and the present case, but they are not so significant as to avoid conflict in principle with our present decision on the Eleventh Amendment issue. Since Judge Garth considered the Eleventh Amendment issue a borderline question and Judge Hunter was of the view that the Eleventh Amendment did not bar the notice relief, although he also recognized some problems with the form of the proposed notice, we do not view that case as strong authority to the contrary.

If our task was only to enforce the federal regulations, use our equitable powers and heed the admonition of the 82nd Psalm to "Do justice to the afflicted and needy," our decision would not be so difficult. It appears that the needed list of applicants and information is already available from the state computers and that the administrative cost to the state of the contemplated modified notice procedure would not be significant. No judgment for any award of damages against the state comes from the federal court. The members of the class will be given no more by the proposed modified notice than what they would have gathered by sitting in the courtroom, or by reading and listening to news accounts had the case attracted any attention. As for the state, our decision means only that if an appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any back payment may be due the applicant. It cannot be strongly argued that the problem did not arise in part from a past breach. The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment. We reverse and remand for additional proceedings not inconsistent with this opinion.

PELL, *Circuit Judge*, dissenting.

Being of the opinion that the constitutionally designated "inferior courts" who have vested in them the "judicial Power of the United States," should, in the orderly exercise of that vested power, refrain from attempting, no matter how artfully done, to accomplish by indirection that which has been specifically prohibited, particularly in the very litigation in which the prohibition was proclaimed, I respectfully dissent. The fact that the result may appear desirable from a societal point of view should play no part in the decision.

The case before the panel of this court, reported at 551 F.2d 152, involved, in my opinion, such an effort at indirection. The *en banc* majority opinion agrees that the panel properly struck down as violative of the Eleventh Amendment the order of the district court. The validity of that order was all that was presented to the panel for decision. The *en banc* majority opinion then proceeds to attempt to prescribe a constitutionally inoffensive form which the state authorities would be required to send to those persons precluded by the Supreme Court decision from collecting by direct judgment the very amounts which would be involved in the notices to be sent.

The Supreme Court in reversing the first order of the district court as affirmed by this court did so on the basis that the order would result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," 415 U.S. at 668.

Now, notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

This court, in my respectful opinion, should not lend its hand to such subterfuge.

TONE, *Circuit Judge*, dissenting. Judge Wood's opinion for the court presents an appealing solution to the Eleventh Amendment problem. In my view, however, the Supreme Court's decision that a federal court may not retroactively enforce the plaintiffs' rights against the state, *Edelman v. Jordan*, 415 U.S. 651, 658, *et seq.* (1974), precludes us from entering an order aimed solely at retroactive enforcement, albeit in another form.

BAUER, *Circuit Judge*, dissenting. I join in the dissents of Judges Pell and Tone.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit